

STATE OF COLORADO

Contract Procedures and Management Manual

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Contract Procedures and Management Manual

Revision #1 – January 1, 1999

The following 17 pages, contain the 15 Items that were incorporated into the State of Colorado Contract Procedures and Management Manual as of January 1, 1999. This is the first revision to the Manual, which was originally published in August 1997. This document is made available to assist users in understanding the rationale behind the revisions. Should you have question or comments, please contact John Ivy in the State Controller's Office at 303-866-3765.

Item 1: Reference to the CURE, *Contract User's Resource for Excellence*, pg. 1-14

Revision: Page 1-14, *Contract Improvement Initiatives in Colorado State Government*, line 9, title of the CURE is changed to "*Contract User's Resource for Excellence*."

Comments: In 1997, the title of the CATF/CCIT newsletter (known as the CURE) was changed from "*Contract User's Redtape Eliminator*" to "*Contract User's Resource for Excellence*" to better describe the current objectives of the quarterly newsletter published by the CATF/CCIT.

Item 2: Purchase Orders/State Price Agreements Discussion, p. 6-4

Revision: Lines 1-4 at the top of page 6-4 are revised to read:

Supplies may be ordered from State Price Agreements using purchase orders, regardless of contract amounts. Some State Price Agreements for services have adequate contract terms and conditions that permit orders to be placed using purchase orders, regardless of the order amount. The Division of Purchasing will designate those State Price Agreements for services that permit orders to be placed using State purchase orders regardless of the order amount. Of course, contracts may still be used (and in some cases may better protect the interests of the State) when buying from a price agreement.

Comments: This revision was necessary because not all State Price Agreements for services permit orders using purchase orders. The Division of Purchasing designates which vendors have signed the comprehensive terms and conditions that permit ordering of services using purchase orders regardless of the amount of the order.

Item 3: Industrial Hygienist Services Acquisition Using State Contracts, p. 6-4

Revision: The last paragraph (subparagraph 3) of 6-4 is changed to "Acquiring architectural services, industrial hygienist services, engineering services, land surveying, and landscape architectural services;"

Comments: Section 24-30-1401, et. seq., CRS was revised in 1997 to add “industrial hygienist services” to the list of professional services that are governed by the professional services selection statute.

Item 4: Worker’s Compensation Discussion, Page 6-26

Revision: The first paragraph at the top of page 6-26 is deleted and the following substituted:

Agency personnel should not be advising contractors about workers’ compensation requirements. Generally, however, an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to pay either unemployment taxes or obtain workers’ compensation. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to insist on receipt of any forms or certifications. In any other case, normally the entity will be able to provide evidence that it has workers’ compensation coverage. There is an exception for corporate officers or members of limited liability companies (LLCs). (Section 8-41-202, CRS) They may elect to reject workers’ compensation coverage; this election most commonly is made by officers of small, closely held corporations. The election must be made by filling out a form WC43 (“Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company”) or substantially equivalent form (Rule IID1, Election to Reject Coverage, pp. 3.01-3.04, 7 CCR 1101-3), and providing the form to the insurance carrier (if any) or to the employer compliance unit of the Division of Workers’ Compensation.

Comments: The form referred to at page 6-26 of the *Manual* was designed by Colorado Compensation Insurance Authority (CCIA) for use by its policyholders in order to satisfy statutory provisions governing “statutory employers.” The current manual discussion erroneously required submission of a CCIA form whenever a contractor claimed to be exempt from workers’ compensation laws.

Item 5: Addition of Intellectual Property Issue text.

Revision: The following discussion about intellectual property is added before “Amendments, Changes, and Modifications” on current page 6-39, with pages beginning with 6-39a added to the *Manual*.

Intellectual Property Issues

One common problem in contracts is the reservation of lots of rights in documentation, without requiring any delivery of documentation or data. The standard clause that says the State “owns”

all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation, for example. So, as you read this discussion about “intellectual property rights,” do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. Otherwise, the contractor probably is not required to deliver any.

Patents, Copyrights, and Trademarks

Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to copy the deliverable in the future, to modify it, to transfer it to other companies or individuals, etc. These rights to copy, modify, and transfer are embodied in a separate set of property rights called “intellectual property rights.”

A patent, for example, is a right created under federal law, granting the inventor the exclusive right to use a patented invention. No other company or individual may then use that patented invention without permission, usually granted through a “license” or assignment of the right to the invention. In a sense, this grants a monopoly to the inventor for protection of the idea.

In transactions in goods governed by the Uniform Commercial Code, a sale includes an implied warranty (i.e. promise) that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (Section 4-2-312, CRS) So if a holder of a patent tries to sue the State for infringing its patent by using a purchased supply, the State can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyrights are somewhat different. They apply to “works” rather than inventions and do not protect the “idea,” only the manifestation of the idea. The right of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works (i.e. modify), and publicly display the work. A copyright exists upon creation of a work, although federal registration grants certain procedural advantages to anyone trying to sue someone for infringement. Copyrights -- like patents -- are creatures of federal law.

There is a limited exception, known as the “fair use” doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however, cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a “fair use.” This becomes an issue for State contracts where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the State. Whether the State then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the “fair use” doctrine is very limited -- and should be addressed in the contract.

Trademarks are usually of less concern to governments. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under both state and federal laws.

Trade Secrets and Nondisclosure/Confidentiality Agreements

Trade secrets are categories of information that are afforded protection under state law. While the legal requirements for patents are quite complex, most companies use trade secret protections as an additional way to protect ideas. The advantage to the trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for “new and useful” inventions) or copyright law (protections granted only to “works”). In Colorado, a trade secret is defined as “the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value.” (Section 7-74-102, CRS) These categories of information are much broader than would be protected under either patents or copyrights.

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. That is why companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A State agency’s failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially attorney fees.

Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act may limit the ability of the State agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A has these essential elements.

Intellectual Property Rights in Software

Because of the technical limitations of patent law, most companies protect their software using a combination of copyright and trade secret/nondisclosure concepts. Typically, the software is not “sold” to the State agency, only “licensed.” And to the extent the contract requires delivery of source code of previously developed software, often the contracts will have nondisclosure provisions that restrict disclosure of that source code and other associated documentation.

Who owns the copyright or patent in an independent contractor situation?

In patent law, there is a “shop right” granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or “reduced to practice” using the employer’s time or resources. In copyrights, there is a “work for hire” doctrine that grants

ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the State would not automatically get any rights to use or ownership in the intellectual property right, other than as necessary for use of the product delivered under the contract. Consequently, if the State intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original contract, such a right would have to be included in the contract. While there may be instances when the particular circumstances of the service performance may give the State a “work for hire” right, for example, it is not advisable to rely on it. Specify the terms of any ownership or license rights in the contract. This is particularly important if the State intends to modify or maintain the software after delivery.

Ownership and License Rights - the State Model Clauses

Appendix A of Chapter 6 of the *Manual* provides most of the tools to write an integrated set of clauses that defines the intellectual property rights. Consider the following:

1. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the State ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. Often, the contractor will not have any problem with the clause if all the development is unique and funded by the State. In the case of previously developed software modified for State purposes, though, the contractor often will want to negotiate these ownership rights.
2. Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a simplified definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.
3. In the case of software, in particular, vendors will often want to retain ownership rights and license “use” rights to the State. Often, vendors will have license provisions that they want to use, which is acceptable so long as the agency and its information management professionals understand the terms and use restrictions. At the very least, the license provisions in the contract should clearly identify:
 - a. The term of the license, usually perpetual;
 - b. The cost of the license;

- c. That other entities on behalf of the State can modify and use the licensed software; and
 - d. All of the rights that the State needs to retain, usually including the right make archival copies and to modify at least the portion customized for State use.
4. A simplified version of a license provision to accomplish these objectives is:
- The State is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform, copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the “State” includes any other person or entity performing services for the State to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.
- 5. In a complex software development contract, involving previously developed software and a customized software module, sometimes the owned software and licensed software are defined separately. The definitions of “owned software” and “licensed software” then become a key part of the contract.
 - 6. In general, it is acceptable to permit a vendor to retain “ownership rights” in its previously developed software, so long as the State retains adequate license rights at a reasonable price to permit subsequent use and maintenance of the software.
 - 7. Always use caution in negotiating the documentation and ownership/license clauses. It is easily to unwittingly create a de facto sole source situation because the State has either ordered insufficient documentation or retained insufficient rights to permit its own employees or other contractors to maintain the software.

Federally Funded Contracts

Federal grants often require specific allocation of rights in intellectual property conceived or developed with federal funding. Clauses C9 and C10 are the Federal Patent Rights and Rights in Data and Copyrights clauses developed from the *Common Rule*, also known as the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*. (OMB Circular 102) Agencies are encouraged, however, to ask the federal agencies administering the particular grant programs to identify the clauses that should be used in the State’s subrecipient agreements whenever “works” or “inventions” are likely byproducts of the contract performance.

Limitation of Liability/Warranty Disclaimer Issues

Especially with respect to software development agreements, vendors are concerned about potential consequential damages (e.g. lost productivity damages from software bugs) that can

potentially far exceed the contract amount. Consequently, many software vendors propose limitation of liability and warranty disclaimer language. Consider these issues:

1. Do not disclaim or exclude the “warranty of title and against infringement” in any contracts. This implied Uniform Commercial Code warranty in “transactions in goods” provides some protection against adverse claims by third parties alleging that the vendor has infringed their intellectual property rights.
2. Other implied warranty disclaimers are fairly common. An example is at clause B11. This disclaimer will limit “warranties” to those expressed in the contract. The State gives up a chance to later claim that the product breached the implied warranty of merchantability or fitness for a particular purpose. See pp. 10-61 and 10-62 for more information about these implied warranties. If an agency is being careful about drafting the contract and statement of work, it should not have to rely on implied warranties anyway.
3. The limitation of liability policies on pages 6-27 and 6-28 apply to software licensing agreements also. Be aware, however, that agreeing to limit liability to the contract amount may cut off vendor liability well short of potential State liability/defense costs if a third party sues the State for intellectual property infringement. Consider using an “Intellectual Property Indemnification” clause such as that at B15 in cases where: 1) limitation of liability provisions are included that limit the vendor’s liability, 2) the State could incur significant costs defending an intellectual property action, and 3) discontinuing use of the infringing software or invention is not a viable alternative because of the critical nature of the product or software.

Final Caveat

Integrating rights in data/software and limitation of liability clauses can be difficult, especially when vendor forms are incorporated in the contract. Typically, important terms and conditions are spread throughout the documents, and often terms are used in different ways. Unless the contract amount is relatively insignificant, the nature of the requirement routine, or the consequences for breach otherwise not substantial, we recommend that you seek either the help of experienced purchasing professionals or legal advice from your assigned assistant attorney general. Even more important, agency information management professionals need to be involved to insure that document deliverables are being ordered that permit State use and maintenance of software, and that licensing use restrictions are acceptable.

Item 6: Revisions to Termination for Convenience Clause (Long Form), Paragraph A12, pg. 6-47

Revision: Subparagraph C. 5) on page 6-48 is changed to, “The total sum to be paid the contractor under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies

and manufacturing materials under subparagraph B, and the contract price of work not terminated.”

Comments: The current clause incorrectly cites subparagraph B in the first line of subparagraph C. 5).

Item 7: Use of Termination for Convenience Provisions, Clauses A11 and A12, pg. 6-47

Revisions: Replace the comments following clauses A11 and A12 with the following:

Clause A11 Comment:

This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the contractor and still insure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules “long form” clause, the next clause in this Appendix, is more appropriate.

Occasionally, contractors will ask to make the termination for convenience clause “mutual,” permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of contractor termination on advance or progress payments, and the obligation of the contractor to return them; whether the right of the contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services received by the State; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the contractor’s right to terminate at will and receive compensation.

Clause A12 Comment:

This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses “mutual” and the contract terminable at will by the contractor.

Comments: These revisions to the comments following the termination for convenience clauses clarify the circumstances when the “short form” and “long form” versions of the clause are appropriate. The revisions also include cautions about modifying the clauses to permit mutual termination for convenience provisions.

Item 8: Revision to Assignment Clause, Paragraph A18, pg. 6-53 and Assignment Discussion in Chapter 10, pg. 10-37

Revisions: 1. The word “only” is deleted in the fourth line of clause A18.

2. The following sentence is added to clause A18, “This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- and the contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved.” In the commentary box, the last sentence of the first paragraph is changed to, “Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract.”

3. On page 10-37, the last three sentences of section 5.4 are changed to, “Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract. Legally, the State is obligated to honor such an assignment once it receives notice. If a notice of assignment of payment is received, do not pay the original contractor; contact your agency or institution controller immediately. Other assignments, on the other hand, such as assignment of performance duties or obligations, can be controlled by requiring consent of the State. Appendix A to Chapter 6 has an example of such a clause.”

Comments: 1. The first revision is intended to separate the “third party beneficiary” exclusion, a separate issue, from the operation of the assignment clause. Paragraph A22 is the clause used to express the parties’ intention that the contract is not a “third party beneficiary” contract. The assignment clause, on the other hand, makes the rights and obligations binding on assignees and successors.

2 & 3. In Colorado, contractors generally have the right to assign payment. See section 4-9-319, CRS (1997). Consequently, the anti-assignment provisions should not be construed or administered to prohibit assignment of payment rights. The second and third revisions highlight the distinction between payment assignments and other assignments. The necessary changes are made to Chapters 6 and 10. Additionally, coverage is added to require submission of written notice of assignment to the agency, department, or institution controller.

Item 9: Harmonization of Force Majeure and Termination for Default clauses, Paragraph A21, pg. 6-55

Revision: The last sentence of clause A21 is revised to make the model clause's list of "force majeure" causes identical to those in the long-form termination for default clause, paragraph A14, page 6-50:

As used in this contract "force majeure" means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

Add the following commentary box after clause 21:

"Force majeure" means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of "force majeure" events in the clause. Generally, if the long-form termination for default clause is used, this "force majeure" clause need not also be added to the contract. The list of events constituting "force majeure" can be negotiated and modified by the parties.

Comments: The list of force majeure causes was revised so the list in the long-form termination for default clause (taken from the Procurement Rules) is the same as the list in the stand-alone force majeure clause. Occasionally, agencies have been incorporating both clauses, which under the original manual had inconsistent force majeure provisions, leading to potential ambiguity in scope of the force majeure events. These force majeure events can be negotiated and modified by the parties.

Item 10: Revision of the title of the "Sovereign Immunity" Clause A23, pg. 6-56

Revision: The title of the clause is changed to "Governmental Immunity."

Comments: In Colorado, the concept of "sovereign immunity" was abrogated in 1972 by the Colorado Supreme Court, and the doctrine is now recognized only as provided by statute. "Governmental Immunity" is a more correct description of the immunities embodied in the Colorado Governmental Immunity Act, section 24-10-101, *et. seq.*, CRS.

Item 11: Clarification of Confidentiality of Records Clause, Paragraph B.5., pg. 6-60

Revision: Add brackets to the first sentence of subparagraph 5A, so it reads "[The contractor is designated an agent of the State for the purposes of the confidentiality requirements of Section 8-72-107, CRS.]".

Comments: Not all contracts will establish the agency relationship contemplated in the statute that is cited in the model clause. As the commentary to the clause indicates, only the Division of Employment

may designate agents for access to confidential employment records. The first sentence and the related parenthetical statutory reference in line 6 of the clause were intended to be an example of how to incorporate program-specific confidentiality requirements in contracts. The first sentence of subparagraph 5A was not intended to be a confidentiality provision of broad applicability. Normally, the first sentence of the clause should be deleted.

Item 12: Federal Audit Provisions, Paragraph C7, pg. 6-86

Revision: The first paragraph is deleted and the following substituted:

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending \$300,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions of Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed \$300,000.

Comments: OMB Circular A-128 was superseded by OMB Circular A-133 and the language strengthened to require pass-through entities to monitor subrecipient activities to assure compliance with audit requirements.

Item 13: Revision to Certifications, Addition of Environmental Tobacco Smoke Certification, Clause C12, pgs. 6-89 and 6-90

Revisions: Clause C12, page 6-89, is replaced with the following:

12. Federal Certifications

Certification Regarding Debarment, Suspension, Ineligibility And Voluntary Exclusion-Lower Tier Covered Transaction

Instructions for Certifications

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other

remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.
4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transaction.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily

excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

Certification Regarding Drug-Free Workplace Requirements

Instructions for Certifications

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.
2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.
3. For grantees other than individuals, Alternate I applies.
4. For grantees that are individuals, Alternate II applies.
5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.
6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department

while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

Drug-Free Workplace Certifications

Alternate I. (Grantees Other Than Individuals)

A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
2. Establishing an ongoing drug-free awareness program to inform employees about-
 - a) The dangers of drug abuse in the workplace;
 - b) The grantee's policy of maintaining a drug-free workplace;
 - c) Any available drug counseling, rehabilitation, and employee assistance programs; and
 - d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;
4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:
 - a) Abide by the terms of the statement; and
 - b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;

6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:
 - (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
 - (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5,and 6.

B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:

Alternate II. (Grantees Who Are Individuals)

1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;
2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

Certification Regarding Lobbying

(Certification for Contracts, Grants, Loans, and Cooperative Agreements)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering

into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(Statement for Loan Guarantees and Loan Insurance)

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Tobacco Free Certification

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's

services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the contractor certifies that it will comply with the requirements of the Act. The contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.

Comments: The certification language on pages 6-89 and 6-90 has been changed to better conform to model certifications in the Code of Federal Regulations. In particular, the requirement for "flow down" of certifications to subrecipients has been added. The "tobacco free" certification was added consistent with the 1994 federal statute, Public Law 103-227, the Pro-Children Act of 1994.

Item 14: Incorrect Statutory Reference in Vendor Offset Intercept System Notice for Tax Debts, Special Provision #9, pg. 6-92

Revision: Line 3 of Paragraph 9 of the Special Provisions is changed to "Article 21, Title 39, CRS."

Comments: The published version of the Special Provisions erroneously referred to the wrong article in Title 39 with respect to tax debts. The correct article should have been "21" instead of "22."

Item 15: Professional Liability Clause in Architect/Engineer Contract, State Buildings Annex

Revision: The next to last sentence of Article 20, Professional Liability for Errors and Omissions, is changed to, "The Architect/Engineer shall be responsible for all claims, damages, losses, or expenses, including attorneys fees, arising out of or resulting from the performance of Professional Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of the Architect/Engineer, any consultant or associate thereof, or anyone directly or indirectly employed by Architect/Engineer."

Comment: This clarification is intended to correct previous versions of the State Buildings Program change that had erroneously omitted the words "is caused" from the sentence.

A Return Visit to the State Controller's Office

Remember that the contract is not effective until approved by the State Controller or his delegate. Once the contract gets to the State Controller's Office, you are almost "home free"! But remember, the Attorney General is enforcing policies that are in the statutes and rules that govern potential legal problems for the Controller, who ultimately can approve or disapprove a contract. For example:

1. The Colorado *Special Provisions* not only must be included, they can't be modified unless approved by the State Controller. One "felony" is inclusion of an indemnification provision in the contract that conflicts with the one at paragraph 4 of the *Special Provisions*, without written justification and approval by the Controller. The "capital offense" is including an indemnification provision that requires the State to indemnify the contractor for damages it incurs as a result of contract performance. As we mentioned before when talking about the Risk Management office, such a clause usually is illegal because it violates the Colorado Constitution. Besides, it's not fair. We are paying contractors to do the work. We shouldn't have to answer for their liability. Lesson: read the *Special Provisions*, include them, **never** change them. If you are negotiating a contract that uses the term "indemnify" or "hold harmless", you better get the advice of counsel and be prepared to justify in writing why you need the clause.
2. State Fiscal Rules require that advance payments be approved in writing by the State Controller or an authorized delegate.
3. Any modification/amendment procedure in the contract that attempts to informally change the contract without processing as an amendment will probably be disapproved. The Controller has to approve all commitment documents, including amendments. The Controller requires formal routing and legal review of all amendments by Fiscal Rule. You can't change this Rule by contracting with the other party to permit changes and price increases by mutual agreement. There is an exception: you can use a modification mechanism consistent with the State Controller's policy on contract modifications and change orders, enclosed in this *Manual* in the Policy Letters Annex. For example, the policy has an approved Change Order Letter process that bypasses Attorney General review for use in grant and subgrant programs that provide for benefits to third parties, e.g. contracts for health or social welfare benefits where the volume of services being provided are directly proportional to the level of funding.
4. Attempts to create financial obligations beyond the current fiscal year--the "binding the future legislature" problem--are illegal. That is why the Colorado *Special Provisions* has a clause at paragraph 2 that conditions contract performance on availability of funds. Remember, generally the State appropriates money from year-to-year. Unlike private individuals and companies, you can't agree to a contract that unconditionally extends funding for more than one year at a time. One more reason to include those *Special Provisions* . . .

5. Encumbrance errors can also cause a contract to be disapproved by the Controller. If you cite the wrong source of funds, or there are not enough funds to satisfy the commitment, or the contract has open-ended price/payment provisions or no ceiling on the amount to be paid, the contract will be disapproved.

After Contract Approval - First a Celebration! - Then Contract Management

You can write the best contract in the world, but if no one is inspecting the goods or services to assure their compliance with requirements, money is going to be wasted. Writing a good contract is a giant step towards sound contract administration and management, because it should clearly define the expectations of both parties. But you need to have a process in place to insure that payment is not made under the contract until acceptable performance has been received (hopefully a right given you in the contract . . .). This is a lot simpler to say than to do. As a result of a State performance audit in 1995, and the work of the Contract Management Task Force, a whole chapter has been added to this *Manual* that addresses contract administration issues and responsibilities. The sections in Chapter 10 describe contract monitoring responsibilities, performance remedies, and other key aspects of managing a contract.

Contract Improvement Initiatives in Colorado State Government

In 1994, the central approving offices banded together to find ways to improve the contract approval process by creating a group called the Central Approval Task Force (CATF). Part of that process was the formulation of the Colorado Contract Improvement Team (CCIT), a group composed of representatives from all of the State agencies. The CATF meets monthly, and the CCIT quarterly. The CATF/CCIT structure is designed to foster cross-feed among central approvers and agencies of ideas related to contracting, provide a forum for discussing improvements, and generally serve as a clearinghouse for purchasing and contracting-related information that is important to State employees involved in the process. The CCIT and CATF publish the *Contract User's Resource for Excellence (CURE)* newsletter monthly, and subcommittees have been established to address issues such as contract standardization, coordination of statutes and regulations, improvement to the *Manual*, training, etc. This *Manual* was a byproduct of work done by the CCIT, based on recommendations received from users.

Agencies are encouraged to set up their own "user groups," and you should find out when your user group meets. The CCIT lives and breathes by the quality of these user groups--they are the vehicle to "get the word out" to everyone else in the agencies that are involved in the contracting process.

One Final Note - This Stuff Isn't Easy

You can't just read this summary and expect to do a good job in purchasing or contracting. This is just the road map into the more detailed material in the *Manual*. The Division of Purchasing training will give you much more detailed, invaluable information about vendor selection. Even

Purchase Orders

A purchase order is a unique type of pre-printed State form or agreement, which may be used when, permitted by Chapter 3 of the State Fiscal Rules. These agreements are different from traditional written contracts in three critical ways. First, they constitute a delegation of the Controller's approval authority to the purchasing agent; they may be executed without the approval of the Controller or Controller designee. Second, no legal review is required. Third, they are usually signed only by the State, not by the vendor or contractor. This third feature is highly unusual in that contract law and common sense generally dictate that both parties must sign a contract in order for each to be bound by it. All of these purchase order distinctions from traditional contracts have one factor in common, which accounts for their streamlined treatment. Properly used, purchase orders adequately protect the State without a formal contract and its accompanying oversight.

Purchase orders are designed for the purchase of goods (not services) under Article 2 of the Colorado Uniform Commercial Code (the "UCC"), located at Title 4, Article 2, CRS (Volume 3). Article 2 of the UCC is an entire body of statutory law governing the sale of goods. Article 2 is an attempt to simplify and lend predictability to commercial transactions for goods by specifying what are reasonable expectations, obligations, and rights of parties where they intentionally or accidentally failed to address a certain issue in a written contract. These laws supplement virtually every agreement for the purchase or sale of goods, except consumer transactions dealt with elsewhere in law. Purchase orders are an attempt by the State to streamline administration by utilizing this body of law to supplement simple one or two page documents with certain pre-printed "*boilerplate*".

The additional protections of law supplementing a properly used purchase order have resulted in a determination by the Controller that review by the Attorney General and the State Controller's Office is not necessary.

Purchase orders are not intended to be used to acquire ongoing services having a significant value over an extended period of time. They may be used to order one-time repairs, maintenance, or construction services up to certain dollar amounts where rules permit and the State is adequately protected. See Chapter 3 of the Fiscal Rules. It is critical to remember that there is no body of law like Article 2 of the Uniform Commercial Code governing services contracts, and the State is therefore protected only by what you write in the agreement. As a general rule for services, if there is any question about whether or not the vendor is an independent contractor, or if you cannot adequately describe what you expect of the vendor on the purchase order form, a formal contract executed by both parties should be used. Remember that the Fiscal Rules provide that any questions as to whether or not a purchase order adequately protects the State should be referred to the Attorney General.

In addition, purchase orders for services in excess of \$25,000 are not permitted by the Fiscal Rules, with few exceptions. One of the notable exceptions is use of a purchase order to order from a basic ordering agreement entered pursuant to State-wide procurement awards—known as State-wide "price agreements." Frequently utilized services may be centrally bid by the

Division of Purchasing for all agencies. Supplies may be ordered from State Price Agreements using purchase orders, regardless of contract amounts. Some State Price Agreements for services have adequate contract terms and conditions that permit orders to be placed using purchase orders, regardless of the order amount. The Division of Purchasing will designate those State Price Agreements for services that permit orders to be placed using State purchase orders regardless of the order amount. Of course, contracts may still be used (and in some cases may better protect the interests of the State) when buying from a price agreement. Of course, contracts may still be used (and in some cases may be required) when buying from a price agreement.

Contracts

Under the Fiscal Rules, any commitment to pay money, which is not a purchase order, must, by definition, be a "State contract" and must be treated as such. Regardless of what label you use (memorandum of understanding, cooperative agreement, grant, *etc.*) the procedures specified in Chapter 3 of the Fiscal Rules apply. Except in certain cases noted below, all contracts must utilize the standard contract form found in Fiscal Rule 3-1 that includes the Colorado *Special Provisions* (a copy is included in Appendix A of this chapter). Notice that most of the important terms, such as the statement of work/specifications, as well as "*boilerplate*" clauses, are not on the *Special Provisions* and have to be developed by the agency. This is in contrast to a State purchase order, which has provisions on its reverse side governing payment, delivery, *etc.*

For real property transactions (leases, capital construction contracts, *etc.*) the State Controller and the Attorney General have approved different formats for these requirements. They are still "contracts," as distinguished from purchase orders; they use special forms due to their unique legal nature and frequency of use. Unless your agency has a statutory exemption from State Buildings Programs for the particular type of transaction involved (e.g. Divisions of Wildlife/Parks, and the Department of Transportation), you must use these approved State Buildings forms.

With respect to other types of contracting, however, there are no prescribed forms. This section will discuss necessary elements of any contract, and Appendix A contains many model provisions to assist you in developing your own contract format for your unique situation.

So, which one? A Purchase Order or A Contract?

Fiscal Rule 3-1 requires use of a State Contract when:

1. Acquiring personal services costing over \$25,000, including maintenance and service agreements;
2. Leasing land, buildings, or other office or meeting space when rental is more than thirty days.
3. Acquiring architectural services, industrial hygienist services, engineering services, land surveying, and landscape architectural services;

“Automobile Liability Insurance”

State law requires all automobile owners to carry a minimum amount of liability insurance for injuries or damage they may cause to others while operating a motor vehicle. State law requires a very low amount of insurance--\$50,000 per occurrence. This is why the State requires its contractors to carry \$600,000, a better approximation of the maximum risk to the State under the Governmental Immunity Act.

Note that the State requests \$600,000 "Combined Single Limit." In contrast to various types of injuries and specific dollar amount for each discussed above under CGL, this requires \$600,000 per occurrence for any combination of bodily injury or property damage to any number of people. This insurance should be carried for all autos used by the contractor in its business, whether or not State personnel or recipients of State benefits are transported by the contractor. Again, the State is looking for responsible contractors as much as for protection from suit when beneficiaries are actually transported. Sole proprietors or professionals using a single vehicle of their own, not transporting others under the contract, may use their own automobile liability with lower limits, but it should always be at least \$100,000 per person, \$300,000 per occurrence.

You should always expect covered automobiles to be indicated with an "X" for either "Any Auto," "All Owned Autos," or "Scheduled Autos." Scheduled autos should be listed in an attachment. "Hired Autos," "Non-Owned Autos" or "Garage Liability" should never be the only coverage indicated; these may be in addition to one of the first three types, but never alone. An individual or small firm may typically have only "Scheduled Autos," just as you and I have insurance for only the specific vehicles we own. Larger contractors may typically have "Any Auto" or "All Owned Autos" because of the large number and types of vehicles they may have in their fleet. "Hired Autos" are vehicles that come with drivers and "Non-Owned Autos" are those leased or rented without accompanying drivers. Again, these should appear only in combination with one or more of the first three listed types.

“Excess Liability”

The contractor may meet the CGL and Automobile Liability limits by a combination of basic insurance for those risks and what is called "Excess Liability." When this is offered, it should be "Umbrella Form," so indicated by an "X" in the appropriate box. The total limits of CGL plus Excess Liability, and Automobile Liability plus Excess Liability, should each equal or exceed the required dollar limits.

“Workers' Compensation”

These limits are set by law. The general form certificate should indicate \$500,000 if insurance is provided by a commercial insurer. If insurance is provided through a government entity, such as Colorado Compensation Insurance Authority ("State Comp."), a separate certificate of insurance on State Comp. or other government letterhead should be provided showing statutorily required coverage is in place.

Agency personnel should not be advising contractors about workers' compensation requirements. Generally, however, an individual operating as a sole proprietor, and not using other employees during the course of contract performance, would not be required by law to pay either unemployment taxes or obtain workers' compensation. The same rule applies to performance of services by the named partners of a partnership that has no other employees. Consequently, in cases where the contractor is exempt from the requirements, there is no need to insist on receipt of any forms or certifications. In any other case, normally the entity will be able to provide evidence that it has workers' compensation coverage. There is an exception for corporate officers or members of limited liability companies (LLCs). (Section 8-41-202, CRS) They may elect to reject workers' compensation coverage; this election most commonly is made by officers of small, closely held corporations. The election must be made by filling out a form WC43 ("Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company") or substantially equivalent form (Rule IIID1, Election to Reject Coverage, pp. 3.01-3.04, 7 CCR 1101-3), and providing the form to the insurance carrier (if any) or to the employer compliance unit of the Division of Workers' Compensation.

Special Items

Near the bottom of the standard certificate there is a blank space for other matters ("Description of Operations/Locations/Vehicles/Special Items"). This should always indicate your agency as an additional insured. This does not mean additional insured status has been obtained (the actual endorsement is better), but it is a good indication the insurance agent knows he is supposed to request it. This is the appropriate start to the process of actually getting additional insured endorsements to the policy. Make sure the certificate so states before going any further with performance. It is recommended that you actually see the endorsement, unless you have worked with the agent in the past and are confident in the accuracy of the certificate. If there is any confusion about the additional insured endorsement, consult the procurement office or legal counsel.

Certificate Holder

Insurance certificates provide no legal rights. Notice the disclaimer in bold type at the upper right hand corner. Being a certificate holder simply means the insurance company, through its agent, has your agency name on file and will attempt to provide you notice of cancellation. The contractor is independently required by the solicitation/contract to provide notice of cancellation, usually 60 days. See the standard requirements in Clause A15, Appendix A.

Property Casualty Insurance

The State has a commercial insurance policy for damage to its property by fire or other "standard perils." If you are asked to carry casualty insurance by a contractor for property leased or purchased on an installment basis, you should first contact the Risk Management Office of the Department of Personnel and make arrangements to have such property listed on the State's policy. DO NOT wait until after delivery of the goods to do this.

State General Liability Insurance

In the mid-1980's the State found itself unable to purchase CGL from commercial carriers. The State began to self-insure for CGL and the Risk Management Office was born.

The Risk Management Office will, upon request by a contractor, issue a certificate showing State CGL coverage. The Risk Management Fund covers only the liability of State agencies and employees, and no one else may be named an additional insured. Further, the State may not promise to use self-insurance to contractually meet any liability except in property leases. See the discussion about indemnification that follows.

Further, the by-laws of corporations frequently require the signatures of two officers on any instruments binding the corporation. In such a case, unless a State agency ensures that the corporate contractor complies with such by-laws by requiring such attestation, the contract may be void or voidable by the contractor and the State agency may thereby be at risk. Signing by a corporate officer authorized to take such action, and attestation by the corporate secretary, fulfills this requirement and protects the State. Such attestation establishes presumption of signature authority.

Intellectual Property Issues

One common problem in contracts is the reservation of lots of rights in documentation, without requiring any delivery of documentation or data. The standard clause that says the State “owns” all rights in documentation delivered under the contract means little if the contract never requires delivery of software documentation, for example. So, as you read this discussion about “intellectual property rights,” do not forget that the contract has to specify what documentation, e.g. software documentation, must be delivered. Otherwise, the contractor probably is not required to deliver any.

Patents, Copyrights, and Trademarks

Some of the most valuable aspects of goods and services are not the actual supply, software, report, or other deliverable, but the right to copy the deliverable in the future, to modify it, to transfer it to other companies or individuals, etc. These rights to copy, modify, and transfer are embodied in a separate set of property rights called “intellectual property rights.”

A patent, for example, is a right created under federal law, granting the inventor the exclusive right to use a patented invention. No other company or individual may then use that patented invention without permission, usually granted through a “license” or assignment of the right to the invention. In a sense, this grants a monopoly to the inventor for protection of the idea.

In transactions in goods governed by the Uniform Commercial Code, a sale includes an implied warranty (i.e. promise) that seller has the necessary title to the goods, and that the goods will be delivered free of the claim of any third party by way of infringement or the like. (Section 4-2-312, CRS) So if a holder of a patent tries to sue the State for infringing its patent by using a purchased supply, the State can sue the seller under the implied warranty of title and against infringement. Consequently, be careful about disclaimers of warranties; do not permit a vendor to disclaim the warranty of title and against infringement.

Copyrights are somewhat different. They apply to “works” rather than inventions and do not protect the “idea,” only the manifestation of the idea. The right of copyright reserves to the maker of the work the right to copy, distribute, prepare derivative works (i.e. modify), and publicly display the work. A copyright exists upon creation of a work, although federal registration grants certain procedural advantages to anyone trying to sue someone for infringement. Copyrights -- like patents -- are creatures of federal law.

There is a limited exception, known as the “fair use” doctrine, to the prohibition on copying copyrighted works without permission. For example, teachers generally can make limited copies of recently published literary materials for one-time use during class. Even they, however,

cannot incorporate published materials into instructor supplements routinely sold to the students; that would probably not be a “fair use.” This becomes an issue for State contracts where contractor-developed materials, e.g. training materials, will be furnished in limited numbers to the State. Whether the State then can just reproduce additional copies when it needs them is not entirely clear in the law -- because the “fair use” doctrine is very limited -- and should be addressed in the contract.

Trademarks are usually of less concern to governments. A trademark or service mark grants the owner the exclusive right to use the mark to identify goods or services. Protections for trademarks and service marks exist under both state and federal laws.

Trade Secrets and Nondisclosure/Confidentiality Agreements

Trade secrets are categories of information that are afforded protection under state law. While the legal requirements for patents are quite complex, most companies use trade secret protections as an additional way to protect ideas. The advantage to the trade secrets is their scope: protections are granted to a broader category of information than might be available under patents (available only for “new and useful” inventions) or copyright law (protections granted only to “works”). In Colorado, a trade secret is defined as “the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses or telephone numbers, or other information relating to any business or profession which is secret and of value.” (Section 7-74-102, CRS) These categories of information are much broader than would be protected under either patents or copyrights.

The downside of trade secrets is that once the secret is lost through lawful disclosure, there are no additional protections. That is why companies typically use nondisclosure clauses in contracts to restrict dissemination of information they consider to be trade secrets. A State agency’s failure to comply with the nondisclosure terms could subject it to substantial liability, and potentially attorney fees.

Contracts must clearly identify the trade secrets (or confidential and proprietary information) when contractors want nondisclosure provisions. A clear marking requirement should be included so contractors have the responsibility for marking any information they consider subject to the nondisclosure provision. Further, contractors should be advised that the Colorado Open Records Act may limit the ability of the State agency to reach binding agreements on categories of material that may not be disclosed. Clause B5B in Appendix A has these essential elements.

Intellectual Property Rights in Software

Because of the technical limitations of patent law, most companies protect their software using a combination of copyright and trade secret/nondisclosure concepts. Typically, the software is not “sold” to the State agency, only “licensed.” And to the extent the contract requires delivery of source code of previously developed software, often the contracts will have nondisclosure provisions that restrict disclosure of that source code and other associated documentation.

Who owns the copyright or patent in an independent contractor situation?

In patent law, there is a “shop right” granted to the employer, permitting the employer to use a patented invention royalty-free where it was conceived or “reduced to practice” using the employer’s time or resources. In copyrights, there is a “work for hire” doctrine that grants ownership rights in the copyright to the employer where creation of the work was specifically commissioned as part of the employment.

However, these doctrines generally apply only to employer/employee relationships. In an independent contractor situation, the State would not automatically get any rights to use or ownership in the intellectual property right, other than as necessary for use of the product delivered under the contract. Consequently, if the State intends to reserve the right to transfer, modify, or expand the uses of a software product beyond what was intended in the original contract, such a right would have to be included in the contract. While there may be instances when the particular circumstances of the service performance may give the State a “work for hire” right, for example, it is not advisable to rely on it. Specify the terms of any ownership or license rights in the contract. This is particularly important if the State intends to modify or maintain the software after delivery.

Ownership and License Rights - the State Model Clauses

Appendix A of Chapter 6 of the *Manual* provides most of the tools to write an integrated set of clauses that defines the intellectual property rights. Consider the following:

1. Clause A8 in Appendix A is the starting point for specifying rights in data, documents, and computer software. That clause gives the State ownership rights, which include the rights to copy, publish, display, transfer, prepare derivative rights, and otherwise use the works. Often, the contractor will not have any problem with the clause if all the development is unique and funded by the State. In the case of previously developed software modified for State purposes, though, the contractor often will want to negotiate these ownership rights.
2. Do not forget to specify the document/data/software documentation deliverables. Clause B4 is a model provision for specifying these deliverables. The clause is designed to be used with an exhibit that has more detail concerning the nature, content, and formats for the data and documents. The clause has a simplified definition of software documentation and its adequacy. This clause is designed to be a starting point for contract drafters who, in conjunction with their information technology professionals, can better define the specific documentation requirements on any given project. Some complex software projects may require detailed definition of source code requirements, for example, that are better defined using national or industry standards for software documentation.
3. In the case of software, in particular, vendors will often want to retain ownership rights and license “use” rights to the State. Often, vendors will have license provisions that they want to use, which is acceptable so long as the agency and its information

management professionals understand the terms and use restrictions. At the very least, the license provisions in the contract should clearly identify:

- a. the term of the license, usually perpetual;
 - b. the cost of the license;
 - c. that other entities on behalf of the State can modify and use the licensed software; and
 - d. all of the rights that the State needs to retain, usually including the right make archival copies and to modify at least the portion customized for State use.
4. A simplified version of a license provision to accomplish these objectives is:
- The State is granted an irrevocable, nontransferable, nonexclusive, paid-up, perpetual license to display publicly, perform, copy, reproduce, prepare derivative works, and distribute any works, drawings, documents, data, or software delivered under this contract. For purposes of this license, the “State” includes any other person or entity performing services for the State to the extent required for use, modification, or maintenance of the works, drawings, documents, data, or software delivered under this contract.
5. In a complex software development contract, involving previously developed software and a customized software module, sometimes the owned software and licensed software are defined separately. The definitions of “owned software” and “licensed software” then become a key part of the contract.
6. In general, it is acceptable to permit a vendor to retain “ownership rights” in its previously developed software, so long as the State retains adequate license rights at a reasonable price to permit subsequent use and maintenance of the software.

Always use caution in negotiating the documentation and ownership/license clauses. It is easily to unwittingly create a de facto sole source situation because the State has either ordered insufficient documentation or retained insufficient rights to permit its own employees or other contractors to maintain the software.

Federally Funded Contracts

Federal grants often require specific allocation of rights in intellectual property conceived or developed with federal funding. Clauses C9 and C10 are the Federal Patent Rights and Rights in Data and Copyrights clauses developed from the *Common Rule*, also known as the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*. (OMB Circular 102) Agencies are encouraged, however, to ask the federal agencies administering the particular grant programs to identify the clauses that should be used in the State’s subrecipient agreements whenever “works” or “inventions” are likely byproducts of the contract performance.

Limitation of Liability/Warranty Disclaimer Issues

Especially with respect to software development agreements, vendors are concerned about potential consequential damages (e.g. lost productivity damages from software bugs) that can potentially far exceed the contract amount. Consequently, many software vendors propose limitation of liability and warranty disclaimer language. Consider these issues:

1. Do not disclaim or exclude the “warranty of title and against infringement” in any contracts. This implied Uniform Commercial Code warranty in “transactions in goods” provides some protection against adverse claims by third parties alleging that the vendor has infringed their intellectual property rights.
2. Other implied warranty disclaimers are fairly common. An example is at clause B11. This disclaimer will limit “warranties” to those expressed in the contract. The State gives up a chance to later claim that the product breached the implied warranty of merchantability or fitness for a particular purpose. See pp. 10-61 and 10-62 for more information about these implied warranties. If an agency is being careful about drafting the contract and statement of work, it should not have to rely on implied warranties anyway.
3. The limitation of liability policies on pages 6-27 and 6-28 apply to software licensing agreements also. Be aware, however, that agreeing to limit liability to the contract amount may cut off vendor liability well short of potential State liability/defense costs if a third party sues the State for intellectual property infringement. Consider using an “Intellectual Property Indemnification” clause such as that at B15 in cases where: 1) limitation of liability provisions are included that limit the vendor’s liability, 2) the State could incur significant costs defending an intellectual property action, and 3) discontinuing use of the infringing software or invention is not a viable alternative because of the critical nature of the product or software.

Final Caveat

Integrating rights in data/software and limitation of liability clauses can be difficult, especially when vendor forms are incorporated in the contract. Typically, important terms and conditions are spread throughout the documents, and often terms are used in different ways. Unless the contract amount is relatively insignificant, the nature of the requirement routine, or the consequences for breach otherwise not substantial, we recommend that you seek either the help of experienced purchasing professionals or legal advice from your assigned assistant attorney general. Even more important, agency information management professionals need to be involved to insure that document deliverables are being ordered that permit State use and maintenance of software, and that licensing use restrictions are acceptable.

Amendments, Changes, And Modifications

Generally

Appendix B is the model State amendment form and instructions. This discussion will explain the limitations and uses of amendments, and instructions for completing the amendment form.

Amendments are routed for approval just like the original contract. There are some modifications that can be executed without Attorney General review, but which still require approval by the State Controller (unless delegated) and the Department of Personnel (unless waived). Those modifications are described in the State Controller's policy memorandum in the Policy Letters Annex, and the model provisions are included in Appendix A

of this Chapter, Clauses B18-B23. Also, some changes to capital construction contracts can be executed without Attorney General review where consistent with State Buildings Program policies approved by the State Controller. Otherwise, amendments must be done using substantially the form in Appendix B.

Modifications and amendments must be "prospective" only. That is, the changes made to the original contract are made effective at the time of modification, not dating back to the effective date of the original contract. In rare situations where the circumstances require such a result, however, retroactive amendments may be permitted, as in the case of something erroneously omitted from the original contract, or where there has been a mutual mistake by the contracting parties.

A contract must contain mutual obligations to be valid. So too must contract modifications. Where, for example, something is to be done by a particular date in consideration for the payment of a sum of money, to adjust these original obligations there must be some give and take. For instance, the State cannot agree to pay more money unless additional services are agreed to.

Whenever a contract or lease is to be modified or amended, be sure to submit a copy of the original document and prior amendments when review and approval is sought. The original shall be referred to in the modification by its date, encumbrance number, and contract routing number, and need only be attached to one copy of the amendments submitted for approval.

If any of the services do not conform with contract requirements, the State may require the contractor to perform the services again in conformity with contract requirements, with no additional payment. When defects in the quality or quantity of service cannot be corrected by reperformance, the State may (1) require the contractor to take necessary action to ensure that the future performance conforms to contract requirements and (2) equitably reduce the payment due the contractor to reflect the reduced value of the services performed. These remedies in no way limit the remedies available to the State in the termination provisions of this contract, or remedies otherwise available at law.

10. Remedies

In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law, the State may exercise the following remedial actions if the contractor substantially fails to satisfy or perform the duties and obligation in this contract. Substantial failure to satisfy the duties and obligations shall be defined to mean significant insufficient, incorrect or improper performance, activities, or inaction by contractor. These remedial actions are as follows:

- A. Suspend contractor's performance pending necessary corrective action as specified by the State without contractor's entitlement to adjustment in price/cost or schedule; and/or
- B. Withhold payment to contractor until the necessary services or corrections in performance are satisfactorily completed; and/or
- C. Request the removal from work on the contract of employees or agents of contractor whom the State justifies as being incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued employment on the contract the State deems to be contrary to the public interest or not in the best interest of the State; and/or
- D. Deny payment for those services or obligations which have not been performed and which due to circumstances caused by contractor cannot be performed, or if performed would be of no value to the State. Denial of the amount of payment must be reasonably related to the value of work or performance lost to the State.
- E. Terminate the contract for default.

The above remedies are cumulative and the State, in its sole discretion, may exercise any or all of them individually or simultaneously.

This clause is commonly used in service contracts. Although contract law provides for numerous remedies for contract breach, occasionally it may be beneficial to specifically mention some in the contract. Note that the clause begins with "In addition to any other remedies provided for in this contract, and without limiting its remedies otherwise available at law. . . ." This specifically does not limit remedies under the contract to those listed. See Chapter 10, Section 7 for a discussion of performance remedies.

11. Termination for Convenience (Short Form)

The State may terminate this contract at any time the State determines that the purposes of the distribution of State moneys under the contract would no longer be served by completion of the project. The State shall effect such termination by giving written notice of termination to the contractor and specifying the effective date thereof, at least twenty (20) days before the effective date of such termination. In that event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the contractor under this contract shall, at the option of the State, become its property, and the contractor shall be entitled to receive just and equitable compensation for any satisfactory services and supplies delivered.

If the contract is terminated by the State as provided herein, the contractor will be paid an amount which bears the same ratio to the total compensation as the services satisfactorily performed bear to the total services of the contractor covered by this contract, less payments of compensation previously made, provided, however, that if less than sixty percent (60%) of the services covered by this contract have been performed upon the effective date of such termination, the contractor shall be reimbursed (in addition to the above payment) for that portion of the actual out-of-pocket expenses (not otherwise reimbursed under this contract) incurred by the contractor during the contract period which are directly attributable to the uncompleted portion of the services covered by this contract. In no event shall reimbursement under this clause exceed the contract amount. If this contract is terminated for cause, or due to the fault of the contractor, the Termination for Cause or Default provision shall apply.

This short form version of the termination for convenience clause is used in contracts with political subdivisions and other contracts not subject to the Procurement Code, and in service contracts having fixed level-of-effort where the State is receiving value as the services are being performed. Janitorial services contracts, for example, would be examples of contracts where this short-form clause may be appropriate, because payment for services in proportion to the performance period completed would fairly reimburse the contractor and still insure that the State receives fair value for its payments. For contracts with commercial entities not meeting these criteria -- e.g. software development/integration contracts involving significant start-up costs -- the Procurement Rules "long form" clause, the next clause in this Appendix, is more appropriate.

Occasionally, contractors will ask to make the termination for convenience clause "mutual," permitting either party to terminate the contract at will by giving specified advance, written notice. In such cases, exercise extreme care, and consider getting legal advice or the assistance of a more experienced purchasing/contracting professional. It is particularly important to consider: the effect of contractor termination on advance or progress payments, and the obligation of the contractor to return them; whether the right of the contractor to compensation after it terminates is clearly stated and requires the State to pay only reasonable compensation for acceptable, completed deliverables having value to the State; whether the milestones and associated progress payments are distinguished from the compensation due the contractor for acceptable, completed services and deliverables after termination, since progress payments are often not sufficiently based on the value of services received by the

State; and whether there is procurement authority to acquire replacement or continued services within the needed time. In general, while the termination for convenience clauses in this Appendix are adequate to give the State the right to terminate for convenience, they are not generally adequate to define the contractor's right to terminate at will and receive compensation.

12. Termination for Convenience (Long Form)

Termination

The procurement officer may, when the interests of the purchasing agency so require, terminate this contract in whole or in part, for the convenience of the agency. The procurement officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective. This in no way implies that the purchasing agency has breached the contract by exercise of the Termination for Convenience Clause.

Contractor's Obligations

The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the purchasing agency. The contractor must still complete and deliver to the purchasing agency the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

Compensation

- A. The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the contractor fails to file a termination claim within 90 days from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph C of this Section.
- B. The procurement officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing agency, the proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.
- C. Absent complete agreement, under subparagraph B of this Section, the procurement officer shall pay the contractor the following amounts, provided the payments agreed to under subparagraph B shall not duplicate payments under this subparagraph:

- 1) Contract prices for supplies or services accepted under the contract;

- 2) Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
- 3) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the contractor's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph B of this Section.
- 4) The reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract.
- 5) The total sum to be paid the contractor under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph B, and the contract price of work not terminated.

D. Cost claimed or agreed to under this section shall be in accordance with applicable sections of the Colorado State Procurement Code.

This long form version of the termination for convenience clause is prescribed in the Procurement Rules. The clause "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01. See the comments under Termination for Convenience (Short Form) with respect to the proper use of each clause, as well as cautions in making the clauses "mutual" and the contract terminable at will by the contractor.

13. Termination for Default/Cause (Short Form)

If, through any cause, the contractor shall fail to fulfill, in a timely and proper manner, its obligations under this contract, or if the contractor shall violate any of the covenants, agreements, or stipulations of this contract, the State shall thereupon have the right to terminate this contract for cause by giving written notice to the contractor of its intent to terminate and at least ten (10) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the

contractor under this contract shall, at the option of the State, become its property, and the contractor shall be entitled to receive just and equitable compensation for any services and supplies delivered and accepted. The contractor shall be obligated to return any payment advanced under the provisions of this contract.

Notwithstanding the above, the contractor shall not be relieved of liability to the State for any damages sustained by the State by virtue of any breach of the contract by the contractor, and the State may withhold any payment to the contractor for the purposes of mitigating its damages until such time as the exact amount of damages due to the State from the contractor is determined.

If after such termination it is determined, for any reason, that the contractor was not in default, or that the contractor's action/inaction was excusable, such termination shall be treated as a termination for convenience, and the rights and obligations of the parties shall be the same as if the contract had been terminated for convenience, as described herein.

This short form termination for default clause is customarily used in contracts with political subdivisions and nonprofit entities.

14. Termination for Default/Cause (Long Form)

Default

If the contractor refuses or fails to timely perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the procurement officer may notify the contractor in writing of the non-performance, and if not promptly corrected within the time specified, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere.

TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR A THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKER'S COMPENSATION (AND SHOW PROOF OF SUCH INSURANCE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

This paragraph and the typeface is required by the Personnel Rules to be used in personal services contracts.

The purpose of the provision is to declare the intent of the parties to establish an independent contractor relationship. Failure to maintain an independent contractor relationship can result in the State being held responsible for income tax withholding and FICA taxes, workers compensation, and other liability of "employers."

17. Representatives and Notice

- A. Representatives. For the purpose of this contract, the individuals identified below are hereby designated representatives of the respective parties. Either party may from time to time designate in writing new or substitute representatives:

For the State:

Name	Title
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For the Contractor:

Name	Title
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It is advisable that the responsible employees of the parties be clearly identified, since it is often necessary for parties to a contract to have a continuous course of dealing as the contract is performed.

This provision is not a delegation of signatory authority for the purposes of contracting initially or entering into modifications or amendments. If you want to specify the specific authority of the representative, do so using a provision substantially like the one that follows. Note that you cannot ever give the representative the authority to amend the contract and commit more funds--you must use an approved modification.

- B. Authority. With respect to the representative of the State, such individual shall have the authority to _____, inspect and reject services, approve invoices for payment, and act otherwise for the State, except with respect to the execution of formal amendments to or termination of this agreement pursuant to paragraphs ____ and ____.
- C. Notices. All notices required to be given by the parties hereunder shall be hand delivered or given by certified or registered mail to the individuals at the addresses set forth below. Either party may from time to time designate in writing substitute addresses or persons to whom such notices shall be sent.

For the State:

Name : _____
Department and Division: _____
Address: _____

For the contractor:

This provision will help avoid practical problems caused by misdirected mail. Several representatives may be listed if necessary. Certified or registered mail is preferred, but regular U.S. Mail is a reasonable alternative. The option of personal delivery of a notice could also be provided for.

18. Assignment and Successors

The contractor agrees not to assign rights or delegate duties under this contract [or subcontract any part of the performance required under the contract] without the express, written consent of the State [which shall not be unreasonably withheld]. Except as herein otherwise provided, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns. This provision shall not be construed to prohibit assignments of the right to payment to the extent permitted by section 4-9-318, CRS, provided that written notice of assignment adequate to identify the rights assigned is received by the controller for the agency, department, or institution executing this contract. Such assignment shall not be deemed valid until receipt by such controller -- as distinguished from the State Controller -- and the contractor assumes the risk that such written notice of assignment is received by the controller for the agency, department, or institution involved.

Especially in contracts for personal services, but for most State contracts in general, if the State has selected a certain vendor or contractor, it has done so through a process according to the laws governing State contracting in order to allow for fairness to all potential contractors. If the vendor assigns a contract with the State to another party, then the public confidence in the competitive process may be compromised. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract.

Despite the prohibition on nonconsensual assignment, if a contractor goes into bankruptcy, its accounts and contract may be assigned. If a company reorganizes or merges with another under a different name, it will have successors. The last sentence of this clause assures that these other entities will be bound by the law to complete the contract if the State desires, even though they are not technically parties to the contract.

19. Changes

A written order

By a written order, at any time, and without notice to any surety, the procurement officer may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

- 1) [Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the purchasing agency in accordance therewith] [description of services to be performed];
- 2) Method of shipment or packing [time of performance of services]; or
- 3) Place of delivery or performance of services.

Adjustments of Price or Time or Performance

If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the purchasing agency promptly and duly makes such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of the time for completion.

Time Period for Claim

Within 30 days after receipt of a written change order under the Change Order paragraph of this clause, unless such period is extended by the procurement officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment.

Claim Barred After Final Payment

No claim by the contractor for an adjustment hereunder shall be allowed if asserted after final payment under this contract.

Without a "changes" clause, the right of the State to direct changes in statement/scope of work or specifications is dependent on the willingness of the contractor to agree to amend the contract. "Changes" clauses give the State a limited right to direct changes to the contract that are "within the scope of the contract." Of course, the contractor would be entitled to an equitable adjustment in price/cost and/or schedule if such a change is ordered. Because the State would be committing to a payment of money by exercising this right, use of the changes clause generally would require review by the Attorney General and approval by the Controller.

Elsewhere in this Appendix is an expanded version of the changes clause that permits a bilateral "change order letter" without the necessity of Attorney General review.

This changes clause, an important right to reserve for the State, could be exercised unilaterally (after approval by the State Controller), although a bilateral change is most common using an amendment or other approved modification format. If you are anticipating use of the clause unilaterally, consult counsel.

20. Price Adjustments

- A. Price Adjustment Method. Any adjustment in contract price pursuant to the application of a clause in this contract shall be made in one or more of the following ways:
- 1) By agreement on a fixed-price adjustment;
 - 2) By unit prices specified in the contract;
 - 3) In such other manner as the parties may mutually agree; or
 - 4) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee.
- B. Submission of Cost or Pricing Data. The contractor shall provide cost or pricing data for any price adjustment subject to the provisions of the Cost or Pricing Data Section of the Colorado State Procurement Rules.

If there are any clauses in the contract which give the contractor an adjustment in price/schedule for certain events, the contract should also set out how the adjustment will be done. This clause is set forth in the Procurement Rules for general use, but it "may be varied for use in a particular contract at the discretion of the procurement officer." R-24-106-101-01.

21. Force Majeure

Neither the contractor nor the State shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this contract, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure". As used in this contract "force majeure" means acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor

disputes; freight embargoes; or unusually severe weather.

“Force majeure” means those events for which neither party will be held accountable. The long-form termination for default clause has an excusable delay provision that also excuses delays caused by the list of “force majeure” events in the clause. Generally, if the long-form termination for default clause is used, this “force majeure” clause need not also be added to the contract. The list of events constituting “force majeure” can be negotiated and modified by the parties.

22. Third Party Beneficiaries

It is expressly understood and agreed that the enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement, shall be strictly reserved to the State and the named contractor. Nothing contained in this agreement shall give or allow any claim or right of action whatsoever by any other third person. It is the express intention of the State and the contractor that any such person or entity, other than the State or the contractor, receiving services or benefits under this agreement shall be deemed an incidental beneficiary only.

23. Governmental Immunity

Notwithstanding any other provision of this [contract] to the contrary, no term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the Colorado Governmental Immunity Act, Section 24-10-101, *et. seq.*, CRS, as now or hereafter amended. The parties understand and agree that liability for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of Section 24-10-101, *et. seq.*, CRS, as now or hereafter amended and the risk management statutes, Section 24-30-1501, *et. seq.*, CRS, as now or hereafter amended.

24. Severability

To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

Common law allows for an argument that if any one provision of a contract is deemed invalid, illegal, or inoperative for some other reason, all the provisions in the contract are then suspect and the contract can be rescinded or voided entirely. This clause prevents that argument and allows the State to still hold a contractor liable for parts of the contract that have not been deemed invalid.

25. Waiver

The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

26. Entire Understanding

This contract is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved pursuant to the State Fiscal Rules.

Parties' memories of what was agreed to may get foggy in time and that's why written contracts are valuable. This clause prevents parties from later claiming that there were other provisions agreed to that were not put into the contract. This clause has the effect of saying that, "If it is not written down, it is not valid and the court won't recognize it." Secondly, it makes it clear that changes to the contract must be properly approved and processed under the fiscal rules.

If, at any point after a contract is signed, the parties agree to something different from or in addition to what is contained in the contract, these changes cannot be informally accepted, but must be set forth in writing and embodied in an amendment or approved modification.

27. Survival of Certain Contract Terms

Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this contract and the exhibits and attachments hereto which may require continued performance, compliance, or effect beyond the termination date of the contract shall survive such termination date and shall be enforceable by the State as provided herein in the event of such failure to perform or comply by the contractor.

Examples of these types of long-lived contract terms include: records retention, maintenance and replacement provisions, land use covenants, inspections and certification, indemnification, audit rights, rights in data and software, warranties, etc.

28. Modification and Amendment

This contract is subject to such modifications as may be required by changes in Federal or State law, or their implementing regulations. Any such required modification shall automatically be incorporated into and be part of this contract on the effective date of such change as if fully set forth herein. Except as provided above, no modification of this contract shall be effective unless agreed to in writing by both parties in an amendment to this contract that is properly executed and approved in accordance with applicable law.

One alternative is to reference an Exhibit defining the requirements for data or document delivery. Alternatively, you can specify the content requirements in the contract itself, as has been done in this model software documentation clause. One caveat: before using this provision, consult with a software programming expert to see if there are better ways, such as use of national standards, with which to specify the requirements for software documentation.

5. Confidentiality of Records

- A. [The contractor is hereby designated an agent of the State for the purposes of the confidentiality requirements of Section 8-72-107, CRS.] In the event the contractor shall obtain access to any records or files of the State in connection with agreement, or in connection with the performance of its obligations under this agreement, the contractor shall keep such records and information confidential and shall comply with [Section 8-72-107, CRS, and all other] laws and regulations concerning the confidentiality of such records to the same extent as such laws and regulations apply to the State. [The contractor shall notify its employees that they are subject to the confidentiality requirements as set forth above, and shall provide each employee with a written explanation of the confidentiality requirements before the employee is permitted access to confidential data.]

Under Section 8-72-107, CRS, (1973), the Division of Employment is permitted to give access to its employment records to other governmental agencies and agents of the division "designated as such in writing." This provision imposes on such parties the same confidentiality requirements to which employees of the division are subject. Only the Division of Employment may designate agents for access to confidential employment records.

If the contractor will have access to confidential data other than employment-related information controlled by the State Department of Labor and Employment, use a variation on the above paragraph which removes the statutory citations and references to DOLE, and substitute a requirement that such data will be held confidential unless it is already in the public domain or its release is approved in writing by the State. Eliminate the first sentence regarding agency unless the statute you are referring to expressly permits the granting of agency status to others.

Where it is anticipated that more than a few of the contractor's personnel will be dealing with confidential data, it is usually a good idea to require the contractor to provide each such employee with an explanation of the confidentiality requirements, using a clause similar to the optional sentence at the end of the clause.

- B. Except as required by law, the State will not disclose to third persons, other than contractors or consultants of the State whose performance of services require disclosure, any information marked as "confidential" or "proprietary" or otherwise marked as agreed by the parties. Except as otherwise agreed, "confidential" or "proprietary" information of the contractor which may be marked is information relating to its research, development, trade secrets, business affairs, internal operations and management procedures and like information of its

customers, clients, or affiliates, but does not include information lawfully obtained from third parties, information in the public domain, exhibits, attachments, or appendices to the contract, or information required to be delivered to the State pursuant to the terms of this contract. With respect to any such disclosure to other contractors or consultants of the State, the State agrees to inform them concerning the restrictions on disclosure and include suitable nondisclosure provisions in their agreements. Nothing herein is intended or shall operate as a waiver of any applicable law governing disclosure of records, including the Colorado Open Records Act (Section 24-72-101, CRS). The State agrees to provide the contractor with prompt written notice of requests for disclosure under such laws of contract information within the scope of this clause.

6. Applicable Law

The contractor shall at all times during the execution of this contract strictly adhere to, and comply with, all applicable Federal and State laws, and their implementing regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract.

7. Licenses, Permits, and Responsibilities

Contractor certifies that, at the time of entering into this contract, it has currently in effect all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform the services and/or deliver the supplies covered by this contract. Contractor warrants that it will maintain all necessary licenses, certifications, approvals, insurance, permits, etc. required to properly perform this contract, without reimbursement by the State or other adjustment in contract price. Additionally, all employees of contractor performing services under this contract shall hold the required licenses or certification, if any, to perform their responsibilities. Contractor further certifies that, if it is a foreign corporation or other entity, it currently has obtained and shall maintain any applicable certificate of authority to do business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewable of necessary licenses, certifications, approvals, insurance, permits, etc. required for contractor to properly perform this contract, shall be grounds for termination of this contract by the State for default.

8. Availability of Funds – Lease/Purchase and Installment Purchases

- A. The parties hereto understand and agree this contract is contingent upon continuing availability of funds as provided in Special Provision Two (2) hereinafter, and that the State is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. The State may terminate this contract as provided in the following paragraphs.
- B. The State has reason to believe that sufficient funds will be available for the full term of the contract. Where, for reasons beyond State's control, its funding entity does not allocate funds for any fiscal period beyond the one in which this contract is entered into, or beyond a succeeding fiscal period, where State has exhausted efforts to obtain funds legally available for future fiscal periods, and where such failure to obtain funds does not result from any act or failure to act on the part of State, State will not be obligated to make the payments remaining beyond State's then current fiscal period, nor shall State be liable for

6. Federal Examination of Records Clause

Contractor, and its subcontractors and subgrantees, will give the State, the awarding Federal agency, and the Comptroller General of the United States, through any authorized representatives, access to and the right to examine all records, books, papers, or documents related to the award and contract; and will establish a proper accounting system in accordance with generally accepted accounting standards.

7. Federal Audit Provisions

The Office of Management and Budgets (OMB) Circular No. A-133 Audits of States, Local Governments, and Non-Profit Organizations defines audit requirements under the Single Audit Act of 1996 (Public Law 104-156). All state and local governments and non-profit organizations expending \$300,000 or more from all sources (direct or from pass-through entities) are required to comply with the provisions of Circular No. A-133. The Circular also requires pass-through entities to monitor the activities of subrecipients and ensure that subrecipients meet the audit requirements. To identify its pass-through responsibilities, the State of Colorado requires all subrecipients to notify the State when expected or actual expenditures of federal assistance from all sources equal or exceed \$300,000.

Confirm that the Cognizant Federal agency has not established a different audit threshold for the program involved. Clause A6 has optional clauses that incorporate the applicable cost accounting standards that govern expenditure of funds under federal grants.

8. Conflict of Interest

The contractor (and subcontractors or subgrantees permitted under the terms of this contract) shall maintain a written code of standards governing the performance of its employees engaged in the award and administration of contracts. No employee, officer or agent of the contractor, subcontractor, or subgrantee shall participate in the selection, or in the award or administration of a contract or subcontract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- 1) The employee, officer or agent;
- 2) Any member of the employee's immediate family;
- 3) The employee's partner; or
- 4) An organization which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award. The contractor's, subcontractor's, or subgrantee's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.

9. Patent Rights - Federal Funds

If any invention, improvement, or discovery of the contractor/grantee or any of its subcontractors or subgrantees is conceived or first actually reduced to practice in the course of or under this contract work, and if such is patentable, the contractor/grantee shall notify the State immediately and provide a detailed written report. The rights and responsibilities of the contractor/grantee, third party contractors, and the State with respect to such invention, improvement, or discovery will be determined in accordance with applicable federal laws and regulations in existence on the date of execution of this contract which define contractor title, right to elect title, federal government "march in" rights, and the scope of the federal government's right to a nonexclusive, irrevocable, paid-up license to use the subject invention for its own. The contractor/grantee shall include the requirements of this paragraph in its third party contracts for the performance of the work under this contract.

This clause will not grant the State much of a right in any invention reduced to practice during performance of a federally funded contract. Unless the invention is covered by the limited circumstances of a "shop right," the State would likely have little interest in the invention unless an assignment, license, or other allocation of ownership exists pursuant to contract. This clause is intended to invoke federal rules governing title to inventions, and the federal government's rights in those inventions. In a case in which development is expected to be funded with State funds, contact legal counsel for assistance in drafting necessary contract provisions.

10. Rights In Data and Copyright - Federal Reserved Rights

Except for its own internal use, the contractor/grantee shall not publish or reproduce any data/information, in whole or part, that is recorded in any form or medium whatsoever and that is delivered or specified to be delivered under this contract, nor may it authorize or permit others to do so, without the written consent of the federal government, through the State, until such time as the federal government may have released such data/information to the public.

As authorized by 49 CFR 18.34, the federal government, through the State, reserves a royalty free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize the State and others to use: a) any work developed under this contract or a resulting third party contract irrespective of whether or it is copyrighted; and b) any rights of copyright to which a contractor/grantee, sub-recipient, or third party contractor purchases ownership with federal assistance.

11. Grant Assurances

If this contract involves the expenditure of federal funds, the contractor shall at all times during the execution of this contract strictly adhere to and comply with all applicable federal laws and regulations, as they currently exist and may hereafter be amended, which are incorporated herein by this reference as terms and conditions of this contract. The contractor shall also require compliance with these statutes and regulations in subgrant agreements permitted under this contract. The federal laws and regulations include:

- The "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Common Rule), at 49 Code of Federal Regulations, Part 18.

- Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees).
- The Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).
- The Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation. This act requires that all laborers and mechanics employed by contractors or sub-contractors that work on construction projects financed by federal assistance must be paid wages not less than those established for the locality of the project by the Secretary of Labor).
- Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers).
- Standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. 1857(h), Section 508 of the Clean Water Act (33 U.S.C. 1368). Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (contracts, subcontracts, and subgrants of amounts in excess of \$100,000).
- Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).
- Office of Management and Budget Circulars A-87, A-21 or A-122, and A-102 or A-110, whichever is applicable.
- The Hatch Act (5 USC 1501-1508) and Public Law 95-454, Section 4728. These statutes state that federal funds cannot be used for partisan political purposes of any kind by any person or organization involved in the administration of federally-assisted programs.
- USC 6101 et seq., 42 USC 2000d, 29 USC 794, and implementing regulation, 45 C.F.R. Part 80 et seq.. These acts require that no person shall, on the grounds of race, color, national origin, age, or handicap, be excluded from participation in or be subjected to discrimination in any program or activity funded, in whole or part, by federal funds;
- The Americans with Disabilities Act (Public Law 101-336; 42 USC 12101, 12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213, 47 USC 225 and 47 USC 611.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act, as amended (Public Law 91-646, as amended and Public Law 100-17, 101 Stat. 246-256). (If the contractor is acquiring real property and displacing households or businesses in the performance of this contract.)
- The Drug-Free Workplace Act (Public Law 100-690 Title V, subtitle D, 41 USC 701 et seq.).

- The Age Discrimination Act of 1975, 42 U.S.C. Sections 6101 et. seq. and its implementing regulation, 45 C.F.R. Part 91;
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as amended, and implementing regulation 45 C.F.R. Part 84.

These grant assurance provisions were taken from the Department of Transportation model provisions. You should check your sister federal agency for required assurances.

12. Federal Certifications

Certification Regarding Debarment, Suspension, Ineligibility And Voluntary Exclusion-Lower Tier Covered Transaction

Instructions for Certifications

1. By signing and submitting its proposal and signing this contract, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.
4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted or with whom this contract is made for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting its proposal and signing this contract that should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal and signing this contract that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transaction.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal and execution of this contract, that neither it nor its principals is presently declared ineligible, or voluntarily excluded from participation in this transaction by an Federal department or agency.
2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to its proposal.

Certification Regarding Drug-Free Workplace Requirements

Instructions for Certifications

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant and executes the contract. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.
3. For grantees other than individuals, Alternate I applies.
4. For grantees that are individuals, Alternate II applies.
5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.
6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).
7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

Drug-Free Workplace Certifications

Alternate I. (Grantees Other Than Individuals)

- A. The grantee/contractor certifies that it will or will continue to provide a drug-free workplace by:
 1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition:
 2. Establishing an ongoing drug-free awareness program to inform employees about-
 - a) The dangers of drug abuse in the workplace;
 - b) The grantee's policy of maintaining a drug-free workplace;
 - c) Any available drug counseling, rehabilitation, and employee assistance programs; and

- d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
 - 3. Making it a requirement that each employee to be engaged in the performance of the grant/contract be given a copy of the statement required by paragraph 1;
 - 4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment under the grant/contract, the employee will:
 - a) Abide by the terms of the statement; and
 - b) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;
 - 5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4(b) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant/contract activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant/contract;
 - 6. Taking one of the following actions, within 30 calendar days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:
 - (a) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or
 - (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
 - 7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1,2,3,4,5,and 6.
- B. The grantee/contractor may insert in the space provided below the site(s) for the performance of work done in connection with this grant/contract:
-
-
-

Alternate II. (Grantees Who Are Individuals)

- 1. The grantee/contractor certifies that, as a condition of the grant/contract, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant/contractor;

2. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant/contract activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant/contract.

Certification Regarding Lobbying

(Certification for Contracts, Grants, Loans, and Cooperative Agreements)

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an office or employee of any agency, a Member of Congress, an office or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(Statement for Loan Guarantees and Loan Insurance)

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this commitment providing for the United States to ensure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Tobacco Free Certification

Public Law 103-227, the Pro-Children Act of 1994, requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by any entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by Federal programs either directly or through State or local governments, by Federal grant, contract, loan, or loan guarantee. The law does not apply to children's services provided by private residences, facilities funded solely by Medicare or Medicaid funds, and portions of facilities used for inpatient drug or alcohol treatment. By submitting and signing the application and this contract, the contractor certifies that it will comply with the requirements of the Act. The contractor further agrees that it will require the language of this certification to be included in any subawards which contain provisions for children's services and that all subgrantees shall certify and perform accordingly.

All of these certifications may not be required for particular grant programs, although normally the first three certifications (suspension and debarment, drug free work place, and anti-lobbying) are required. The program administrator should check with the cognizant federal agency, or its implementing regulations, concerning the content of required certifications. Some federal agencies have particular certification forms and instructions for their completion. If the certifications are executed as a part of the grant application or proposal submission, they need not also be included in the contract.

D. Special Provisions

These Special Provisions are required by Fiscal Rule 3-1 to be used in every State contract, including grants.

SPECIAL PROVISIONS

CONTROLLER'S APPROVAL

1. This contract shall not be deemed valid until it shall have been approved by the Controller of the State of Colorado or such assistant as he may designate. This provision is applicable to any contract involving the payment of money by the State.

FUND AVAILABILITY

2. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

BOND REQUIREMENT

3. If this contract involves the payment of more than fifty thousand dollars for the construction, erection, repair, maintenance, or improvement of any building, road, bridge, viaduct, tunnel, excavation or other public work for this State, the Contractor shall, before entering upon the performance of any such work included in this contract, duly execute and deliver to the State official who will sign the contract, a good and sufficient bond or other acceptable surety to be approved by said official in a penal sum not less than one-half of the total amount payable by the terms of this contract. Such bond shall be duly executed by a qualified corporate surety conditioned upon the faithful performance of the contract and in addition, shall provide that if the Contractor or his subcontractors fail to duly pay for any labor, materials, team hire, sustenance, provisions, provendor or other supplies used or consumed by such Contractor or his subcontractor in performance of the work contracted to be done or fails to pay any person who supplies rental machinery, tools, or equipment in the prosecution of the work the surety will pay the same in an amount not exceeding the sum specified in the bond, together with interest at the rate of eight per cent per annum. Unless such bond is executed, delivered and filed, no claim in favor of the Contractor arising under such contract shall be audited, allowed or paid. A certified or cashier's check or a bank money order payable to the Treasurer of the State of Colorado may be accepted in lieu of a bond. This provision is in compliance with CRS 38-26-106.

INDEMNIFICATION

4. To the extent authorized by law, the Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

DISCRIMINATION AND AFFIRMATIVE ACTION

5. The Contractor agrees to comply with the letter and spirit of the Colorado Antidiscrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (CRS 24-34-402), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. *Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts.*

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age. The Contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment upgrading, demotion or transfer, recruitment or recruitment advertising; lay-offs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this non-discrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, State that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap, or age.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Contractor's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and rules, regulations, and relevant Orders of the Governor.

(d) The Contractor and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules regulations and orders.

(e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organization, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment work opportunity because of race, creed, color, sex, national origin, or ancestry.

(f) A labor organization, or the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provision of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.

(g) In the event of the Contractor's non-compliance with the non-discrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975 and the rules, regulations, or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Orders, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or orders promulgated in accordance therewith, or as otherwise provided by law.

(h) The Contractor will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any sub-contracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for non-compliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation, with the subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

COLORADO LABOR PREFERENCE

6a. Provisions of CRS 8-17-101 & 102 for preference of Colorado labor are applicable to this contract if public works within the State are undertaken hereunder and are financed in whole or in part be State funds.

b. When a construction contract for a public project is to be awarded to a bidder, a resident bidder shall be allowed a preference against a non-resident bidder from a State or foreign country equal to the preference given or required by the State or foreign country in which the non-resident bidder is a resident. If it is determined by the officer responsible for awarding the bid that compliance with this subsection .06 may cause denial of federal funds which would otherwise be available or would otherwise be inconsistent with requirements of Federal law, this subsection shall be suspended, but only to the extent necessary to prevent denial of the moneys or to eliminate the inconsistency with Federal requirements (CRS 8-19-101 and 102).

GENERAL

7. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract whether or not incorporated herein by reference which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

8. At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.

9. Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

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10. The signatories aver that they are familiar with CRS 18-8301, et. seq., (Bribery and Corrupt Influences) and CRS 18-8-401, et. seq., (Abuse of Public Office), and that no violation of such provisions is present.

11. The signatories aver that to their knowledge, no State employee has any personal or beneficial interest whatsoever in the service or property described herein:

IN WITNESS WHEREOF, the parties hereto have executed this Contract on the day first above written.

Contractor:

STATE OF COLORADO

(Full Legal Name)_____

BILL OWENS, GOVERNOR

Position (Title)_____

EXECUTIVE DIRECTOR

If Corporation:) Social Security Number or Federal Identification Number
Attest (Seal)

DEPARTMENT OF _____

By _____

Corporate Secretary, or Equivalent, Town/City/County Clerk

APPROVALS:

ATTORNEY GENERAL

STATE CONTROLLER

By _____ By _____

The risk from technically directing subcontractors is that the prime contractor may be able to escape liability for the subcontractor's deficient performance where the State has entered into an implied contractual relationship with the subcontractor by directly dealing with the subcontractor and issuing direction or instructions during performance. Further, the subcontractor may have a right to sue the State directly for alleged breaches by the State under the contract. It is wise to limit the State's obligations (and potential liability) to those owing to the single entity--the prime contractor.

5.4 Assignments Distinguished

When the term subcontracting is used, it usually applies to an element of performance due to the State. For example, a subcontractor in a construction contract may be doing foundation work. In a computer systems contract, there may be subcontractors actually writing the software or supplying some of the hardware. The customary "assignment", on the other hand, involves the contractor's giving away the right to receive something--most often payment. Assignments of the right to payment for the benefit of creditors are common. An example is an assignment to a bank. Section 4-9-318, CRS, permits contractors to assign the right to payment, notwithstanding the existence of a provision in the contract requiring consent to assignment of the contract. Legally, the State is obligated to honor such an assignment once it receives notice. If a notice of assignment of payment is received, do not pay the original contractor; contact your agency or institution controller immediately. Other assignments, on the other hand, such as assignment of performance duties or obligations, can be controlled by requiring consent of the State. Appendix A to Chapter 6 has an example of such a clause.

Checklist of Contract Management Considerations

- Read the contract to identify specific subcontract limitations, approval requirements, reporting obligations, etc.
- Do not interfere in subcontracting decisions made by the prime contractor without the contractual right to do so.
- Never direct the use of any specific subcontractor.
- Do not process claims for payment by subcontractors. Refer the subcontractor back to the prime contractor.
- Retain neutrality in disputes involving the prime contractor and any of its suppliers or subcontractors, except that contract rights or statutory obligations to withhold payments (e.g. in construction contracts) may be exercised, **BUT ONLY TO THE EXTENT DEFINED IN THE CONTRACT OR OTHER APPLICABLE LAW**. Obtain the assistance of legal counsel in cases involving disputes over payment where subcontractors are trying to get the State involved.
- Do not direct or instruct subcontractors or subcontractor employees in performance of work. Work through the prime contractor, unless the contract has specified the scope of technical direction and keep the prime contractor responsible for the work. Reduce to writing and provide a copy to the prime contractor of any instructions given directly to the subcontractor.
- Take assignments of payments seriously. Validate the authenticity of an assignment of payment and comply with its terms. Do not pay the prime contractor after notice of a valid assignment. Consult with legal counsel if questions concerning payment arise.
- Ensure, through appropriate prime contract language, that any patented, copyrighted or other proprietary ownership rights of subcontractors are properly licensed or sold to the State through the prime contractor.

ARTICLE 18. EQUAL OPPORTUNITY - AFFIRMATIVE ACTION

The Architect/Engineer agrees to comply with the letter and spirit of the Colorado Anti-discrimination Act of 1957, as amended, and other applicable law respecting discrimination and unfair employment practices (§ 24-34-402, C.R.S., as amended), and as required by Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975. Pursuant thereto, the following provisions shall be contained in all State contracts or subcontracts.

During the performance of this contract, the Architect/Engineer agrees as follows:

- (a) The Architect/Engineer will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age. The Architect/Engineer will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to the above mentioned characteristics. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Architect/Engineer agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth provisions of this nondiscrimination clause.
- (b) The Architect/Engineer will, in all solicitations or advertisements for employees placed by or on behalf of the Architect/Engineer, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, marital status, religion, ancestry, mental or physical handicap or age.
- (c) The Architect/Engineer will send to each labor union or representative of workers with which he has collective bargaining agreement or other contract or understanding, notice to be provided by the contracting officer, advising the labor union or workers' representative of the Architect/Engineer's commitment under the Executive Order, Equal Opportunity and Affirmative Action, dated April 16, 1975, and of the rules, regulations, and relevant Orders of the Governor.
- (d) The Architect/Engineer and labor unions will furnish all information and reports required by Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and by the rules, regulations and Orders of the Governor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the office of the Governor or his designee for purposes of investigation to ascertain compliance with such rules, regulations and orders.
- (e) A labor organization will not exclude any individual otherwise qualified from full membership rights in such labor organizations, or expel any such individual from membership in such labor organization or discriminate against any of its members in the full enjoyment of work opportunity, because of race, creed, color, sex, national origin, or ancestry.
- (f) A labor organization, of the employees or members thereof will not aid, abet, incite, compel or coerce the doing of any act defined in this contract to be discriminatory or obstruct or prevent any person from complying with the provisions of this contract or any order issued thereunder; or attempt, either directly or indirectly, to commit any act defined in this contract to be discriminatory.
- (g) In the event of the Architect/Engineer's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Architect/Engineer may be declared

ineligible for further State contracts in accordance with procedures, authorized in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, and the rules, regulations or orders promulgated in accordance therewith, and such other sanctions as may be imposed and remedies as may be invoked as provided in Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, or by rules, regulations, or order promulgated in accordance therewith, or as otherwise provided by law.

- (h) The Architect/Engineer will include the provisions of paragraphs (a) through (h) in every subcontract and subcontractor purchase order unless exempted by rules, regulations, or orders issued pursuant to Executive Order, Equal Opportunity and Affirmative Action of April 16, 1975, so that such provisions will be binding upon each subcontractor or vendor. The Architect/Engineer will take action with respect to any subcontracting or purchase order as the contracting agency may direct, as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Architect/Engineer becomes involved in, or is threatened with, litigation with the subcontractor or vendor as a result of such direction by the contracting agency, the Architect/Engineer may request the State of Colorado to enter into such litigation to protect the interest of the State of Colorado.

ARTICLE 19. INSURANCE

It is agreed and understood Architect/Engineer shall maintain in full force and effect adequate comprehensive general liability insurance and property damage insurance, as well as workmen's compensation and employer's liability insurance. Architect/Engineer shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and is caused in whole or in part by any negligent act or omission of Architect/Engineer, any consultant or associate thereof, anyone directly or indirectly employed by Architect/Engineer, or anyone for whose acts any of them may be liable. Architect/Engineer shall submit a Certificate of Insurance at the signing of this Agreement and also any notices of Renewal of said Policy as they occur.

ARTICLE 20. PROFESSIONAL LIABILITY OR ERRORS AND OMISSIONS

The Architect/Engineer promises and agrees to maintain in full force and effect an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$100,000 minimum coverage or such other minimum coverage as determined by the Principal Representative and approved by the State Buildings Programs. The policy shall remain in effect for the duration of this Agreement and for at least two years beyond the completion and acceptance of the facility. The Architect/Engineer shall be responsible for all claims, damages, losses, or expenses, including attorneys fees, arising out of or resulting from the performance of Professional Services contemplated in this Agreement, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of the Architect/Engineer, any consultant or associate thereof, or anyone directly or indirectly employed by Architect/Engineer. The Architect/Engineer shall submit a Certificate of Insurance verifying said coverage at the signing of this Agreement and also any notices of Renewals of the said policy as they occur.